Editor's Note: Reconsideration denied by Order dated Oct. 21, 1998

AMOCO PRODUCTION CO.

IBLA 95-186 Decided May 26, 1998

Appeal from a Decision of the Associate Director for Policy and Management Improvement, Minerals Management Service, affirming a Minerals Management Service order requiring recalculation and payment of additional royalties. MMS-89-0278-OCS.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Royalties: Generally--Statute of Limitations

   The 6-year statute of limitations at 28 U.S.C. § 2415(a) (1994), for commencement by the United States of civil actions for damages, does not apply to limit administrative action by the Department. An MMS order requiring recalculation and payment of additional royalties on a Federal oil and gas lease is an administrative action that is not covered by that statute of limitations.

APPEARANCES: Deborah Bahn Hagland, Esq., New Orleans, Louisiana, for Appellant; Peter J. Schaumberg, Esq., Howard W. Chalker, Esq., Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Amoco Production Company (Amoco) has appealed from the October 31, 1994, Decision of the Associate Director for Policy and Management Improvement (Associate Director), Minerals Management Service (MMS), denying Amoco's appeal of an August 8, 1989, Order by the Area Manager, Dallas Area Compliance Office, MMS, directing Amoco to recalculate and pay additional royalties on Federal Lease No. OCS-G 2698 for the period October 1, 1980, through June 30, 1989.

In his August 8, 1989, Order, the Dallas Area Manager explained that a Dallas Area Compliance Office audit of Amoco's royalty computations and payments for Federal and Indian oil and gas leases revealed that for 6 test

months between December 1980 and August 1983 (including July and October 1981, March 1982, and May 1983), Amoco underpaid royalties by $215,430.88 on Lease No. OCS-G 2698, due to (1) undervaluing gas by pricing it under section 104 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3314 (1994) (repealed effective Jan. 1, 1993), instead of higher prices under NGPA section 102, 15 U.S.C. § 3312(d) (1994) (repealed effective Jan. 1, 1993), (2) underreporting the volume of gas produced from the lease, and (3) deducting an improper transportation allowance. In response to a determination that the payment errors were, in all likelihood, "systemic in nature," MMS directed Amoco to recalculate royalties as specified in the Order from the period of October 1, 1980, through June 30, 1989.

Specifically, with regard to NGPA pricing, the Dallas Area Manager's Order stated that gas produced from Well No. B005 could have qualified for section 102 pricing from its completion in February 24, 1981, but Amoco did not file the required documentation until July 23, 1984. Likewise, Well No. B009 could have qualified for the higher pricing on the date of its completion, January 30, 1980, but an application for section 102 pricing was not received from Amoco until September 19, 1983. The Dallas Area Compliance Office calculated that this undervaluation of product resulted in losses of royalty payments to the United States for 3 test months in the amounts of $1,719.24 (December 1980), $947.02 (October 1981), and $35,980.28 (March 1982). Further, MMS found that in 3 of the 6 test months Amoco had understated the volume of gas on which royalties were due. According to the MMS audit, in March 1982, royalties were not paid on 155,594 Mcf (million cubic feet) of gas; in May 1983 volumes were underreported by 56,187 Mcf; and in August 1983, by 92,467 Mcf. Concerning the transportation allowance, MMS found that while it had approved an allowance of $0.543281 per barrel for the lease for calendar year 1982, its review of royalty payments for oil in March 1982 revealed that Amoco deducted $0.58 per barrel, resulting in an underpayment of $1,044.58.

Accordingly, the Dallas Area Manager ordered Amoco (1) to pay royalties in the amount of $215,430.88 for the 6 test months audited; (2) to review all royalty payments for the lease for the period October 1, 1980, through June 30, 1989, (except for the test months audited) and to determine the months and amounts that royalties were underpaid; (3) to redetermine royalties due each month on Lease No. OCS-G 2698 "using NGPA Section 102 prices effective February 24, 1981, for production from Well No. B005 and January 30, 1980, for Well No. B009"; (4) to redetermine royalties due each month on oil sold from Lease No. OCS-G 2698 using the approved transportation allowance; and (5) to pay all additional royalties due as well as to provide MMS with documentation showing calculations used by Amoco in deriving the corrected royalty figures.

On September 11, 1989, Amoco appealed the Dallas Area Manager's Order to the Director, MMS. Amoco argued that (1) the statute of limitations for commencement of civil actions for damages by the United States found at 28 U.S.C. § 2415(a) (1994) bars MMS from requiring payment of royalties that the Government is precluded from suing to recover under that statute,

in this case for the period prior to August 8, 1983; (2) MMS "lacks statutory authority to require federal lessees to review their royalty accounting for the purpose of identifying underpayments;" (3) since the Federal Oil and Gas Royalty Management Act (FOGRMA) establishes a 6-year limitation on the length of time that a Federal lessee is required to maintain records relating to its royalty payments, it is arbitrary and capricious to require Federal lessees to audit further back than the MMS itself would be allowed to audit; and (4) MMS' order requiring Amoco to review its records "for a period of time that the government is precluded from collecting additional monetary amounts" is an "abuse of discretion." (Amoco Supplemental Statement of Reasons (SOR) (before the MMS Director) dated Oct. 5, 1989, at 4, 6, 13-16.) With regard to the alleged underpayments based on volume of gas reported, Amoco maintained that the royalties were paid, but were credited to the wrong lease as the result of a simple clerical error, and that MMS should not penalize Amoco by requiring payment of those royalties twice.

In her October 31, 1994, Decision, the Associate Director initially noted that much of the dispute had been resolved. Amoco had paid the $1,044.58 royalty underpayment due to deduction of an improper transportation allowance, as well as $129,487.80 for NGPA underpricing between August 1983 and July 1984. Further, the parties had resolved the dispute involving payments on production volumes credited to the wrong lease. Pertinently, the Associate Director's Decision stated:

> I begin by noting that the resolution by the Appellant and MMS of the erroneous transportation allowance and misapplied royalty payment issues has the effect of substantially reducing the scope of the MMS order to perform a restructured accounting. In essence, what remains is an order to review royalty payments for Federal Lease No. OCS-G 2698 from October 1, 1980, to the date(s) upon which the Appellant began to receive, and pay royalties based upon, the section 102 NGPA regulated ceiling price, i.e., the latter part of 1983.

(Decision at 6.) Thus, the Decision below found that the issues on appeal had been narrowed to the following: (1) whether MMS is "barred by the 6-year Federal statute of limitations from demanding recalculation and payment of additional royalties in connection with transactions which took place more than 6 years prior to the date of the MMS demand;" (2) whether MMS has the "authority and reasonable grounds, to require Amoco to perform a restructured accounting and report to MMS any deficiencies in royalty payment identified;" and (3) whether MMS has "authority to order Amoco to take corrective action to remedy identified royalty payment deficiencies which occurred more than 6 years prior to the date of the [August 1989] MMS order." (Associate Director's Decision at 3.)

The Associate Director held that legal precedent supports a finding that 28 U.S.C. § 2415(a) (1994) does not act as a statutory bar to administrative proceedings within the Department to ascertain the extent of the royalty obligation. She also held that, contrary to Amoco's assertions,

MMS was not ordering Amoco to perform a "self-audit," but was requiring a "restructured accounting" limited to the errors MMS had already identified in its audit of Amoco's royalty payment structure, and, further, that such an accounting is supported by section 107(a) of FOGRMA, 30 U.S.C. § 1717(a) (1994), and has been upheld by Federal courts and the Board. In addressing Amoco's argument that valuation and reporting errors cited by MMS are not "systemic" in nature, the Associate Director noted that Amoco had acknowledged that during the time period in question, it paid royalties based upon the section 104 NGPA ceiling price, and that it did not act in a timely manner to file for authorization to collect the higher section 102 NGPA price. The Associate Director held that the circumstances of the audit, which revealed consistent underpricing at section 104 prices in December 1980, October 1981, and March 1982, led to a reasonable inference that similar errors in payment were likely to have occurred in other months "during the time period in question," and that, therefore, MMS had not abused its discretion in requiring Amoco to review and recalculate its royalty payments. Finally, the Associate Director noted that section 103(b) of FOGRMA, 30 U.S.C. § 1713 (1994), permits the Secretary to require Federal oil and gas lessees to maintain records for periods in excess of 6 years where a Federal audit or investigation is under way. Citing Phillips Petroleum Co. v. Lujan, 951 F.2d 257, 260 n.5 (10th Cir. 1991), and Amoco Production Co., 123 IBLA 278, 280 (1992), she concluded that since MMS made its initial demand for records on March 18, 1988, it was entitled under FOGRMA to records dating from March 18, 1982, and, to the extent they still existed, relevant records prior to that time.

Amoco notes in its SOR for appeal to this Board that all issues have now been resolved except the "applicability of the six-year statute of limitations to the self-audit and payment requirements of the challenged order." (SOR at 1.) Amoco argues that the outcome of this appeal should be controlled by the decision in Phillips Petroleum Co. v. Lujan, 4 F.3d 858 (10th Cir. 1993), in which Appellant asserts that the 6-year statute of limitations contained in 28 U.S.C. § 2415(a) (1994) was held to apply to administrative proceedings within the Interior Department regarding royalty collection. Id. at 2. Amoco concedes that the Fifth Circuit Court of Appeals held to the contrary in Phillips Petroleum Co. v. Johnson, CA No. 93-1377 (5th Cir. 1994), but argues that the Fifth Circuit opinion holds little precedential weight since it was not published. "While the Tenth Circuit recognized that the statute of limitations might be tolled in appropriate circumstances," Amoco maintains that "there is no factual basis in the administrative record here for application of the doctrine of tolling." Id. at 2-3. Therefore, according to Amoco, "the challenged order cannot be upheld for the period prior to March 18, 1982 — 6 years before the earliest date that MMS' audit can be said to have been initiated." Id. at 3 (emphasis added).

In its Answer, MMS responds to Amoco's argument pertaining to whether the statute of limitations at 28 U.S.C. § 2415(a) (1994) precludes MMS' assessment of royalties. Specifically, MMS contends that "[t]he IBLA has

held on numerous occasions that statutes of limitations apply to judicial enforcement of administrative action, but not to the administrative action itself." (Citations omitted.)

[1] The 6-year statute of limitations at 28 U.S.C. § 2415(a) (1994) provides that "every action for money damages brought by the United States * * * which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues." This Board has held repeatedly that statutes establishing time limitations for the commencement of judicial actions for damages on behalf of the United States do not limit administrative proceedings within the Department of the Interior. See, e.g., Texaco Exploration & Production Inc., 140 IBLA 282, 284 (1997); Forest Oil Corp., 111 IBLA 284, 287 (1989).

Appellant, however, challenges these precedents, asserting that the Tenth Circuit Court of Appeals has held that the statute "does indeed apply to administrative proceedings." (SOR at 2.) In the recent case of Meridian Oil, Inc., 140 IBLA 135 (1997), we examined the question of whether the Phillips precedent would bar MMS from assessing late payment interest where it had not requested interest in district court proceedings which determined that late royalty payments were due. While the case before us does not in its present posture raise a question regarding late payment interest, we find the analysis in Meridian relevant:

> A demand for payment of interest is not a judicial action for money damages brought by the United States, but rather is an administrative action not subject to the statute of limitations. See S.E.R. Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985); Alaska Statebank, 111 IBLA 300, 311-12 (1989). It is not within our authority to determine whether the statute of limitations would bar a judicial suit to collect royalty deemed owing on a lease. Such determination is properly made by the court before which any collection proceeding is brought. Oryx Energy Co., [137 IBLA 177, 183 (1996)], and cases cited.
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> Phillips Petroleum Co. v. Lujan, 4 F.3d 858 (10th Cir. 1993), cited by Appellant, is not to the contrary. The court there took notice that "[t]he parties agree that 28 U.S.C. § 2415(a) is the applicable statute for determining when the government must commence its action to collect the royalty underpayment." The present appeal before the Board is an administrative action seeking interest for late royalty payments. Under the authorities cited above, it is not subject to the statute of limitations.

Meridian Oil, Inc., supra, at 145-46. We reaffirm this analysis, noting that, in Phillips, the Tenth Circuit gave specific instructions to the district court in how to apply section 2415(a) in the context of FOGRMA; we do

not read the decision to hold that the statute of limitations bars administrative proceedings.

Further, to the extent that the decision in Phillips might be read to apply the statute to administrative proceedings, we note that this Board has in the past in limited circumstances expressly declined to follow isolated decisions of Federal courts even while recognizing that such a decision is the law of the case. See, e.g., Conoco, Inc., 114 IBLA 28, 32 (1990); Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984); Gretchen Capital, Ltd., 37 IBLA 392 (1978). The Board has declined to follow Federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. In our view, those conditions are present in this case.

In a September 7, 1994, opinion on rehearing of a decision reported in Phillips Petroleum Co. v. Johnson, 22 F.3d 616 (5th Cir. 1994), reh'g. granted, No. 93-1377 (5th Cir. filed Sept. 7, 1994), cert. denied, 115B S.Ct. 1816 (1995), the Fifth Circuit addressed this issue in the context of consolidated cases challenging MMS orders to recalculate royalties and pay additional royalties. On rehearing, the court stated in an unpublished 1/ opinion that:

> The term "action for money damages" refers to a suit in court seeking compensatory damages. The plain meaning of the statute bars "every action for money damage" unless "the complaint is filed within six years." (Emphasis added.) Thus, actions for money damages are commenced by filing a complaint. Actions that do not involve the filing of a complaint are not "action[s] for money damages." Since the government has filed no complaint, the agency action is not a[n] action for money damages." Thus, § 2415 is no bar.

(Slip opinion at 3-4.) While the Fifth Circuit's opinion on rehearing in Phillips Petroleum Co. v. Johnson, supra, is unpublished, the Board cannot disregard an opinion which demonstrates that two circuit courts of appeals may arrive at differing conclusions. Accordingly, we reject appellant's

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1/ In a footnote to the opinion on rehearing, the Fifth Circuit noted:

"Local Rule 47.5.1 provides: `The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.' Pursuant to that rule, the court has determined that this opinion should not be published."
Phillips Petroleum Co. v. Johnson, No. 93-1377 (5th Cir. filed Sept. 7, 1994).

assertion that the statute of limitations found at 28 U.S.C. § 2415(a) (1994) requires reversal of the Associate Director's decision. 2/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

2/ Pursuant to statute enacted Aug. 13, 1996, the law now requires that a demand "shall be commenced within seven years from the date the obligation becomes due and if not so commenced shall be barred." Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (FOGRSFA), Pub. L. No. 104-185, § 115(b)(1), 110 Stat. 1705, 43 U.S.C.A. § 1724(b)(1) (West Supp. 1998). Under this statutory provision, demands include payment or restructured accounting orders issued by this Department. This statute was expressly made applicable to production after the first day of September 1996, and thus does not apply to this case. FOGRSFA, § 11, 110 Stat. 1717.